

## 24<sup>TH</sup> FEDERAL LITIGATION COURSE

### PRETRIAL PREPARATION

#### I. INTRODUCTION

This outline provides an overview of the types of matters that you must prepare and consider as you complete your final preparations before trial of a civil case, as well as some miscellaneous management considerations concerning sensitive exhibits during trial. It assumes that discovery has closed, and final dispositive motions have been considered and either denied or denied in part.

Whether you are lead counsel or second chair, consider the matters listed below and devise a clear, definitive division of labor between yourself and any co-counsel, and paralegal (if any). Assume that any matter that you do not explicitly delegate becomes your sole responsibility. Assume that no matter how well you set up your Pretrial checklist, you will miss something. Assume this outline has missed (more than) something.

This checklist is a model or template. It is based primarily on Local Rules of the Federal District Court, Middle District of Florida. It will not fit your case perfectly.

#### II. REFERENCES

- A. Imwinkelried, Edward J. *Evidentiary Foundations* (LEXIS-NEXUS Law Publishing, 5<sup>th</sup> ed. 2002; web site: <http://www.bookstore.lexus.com>).
- B. Koeltl, John G. and Kiernan, John S., *The Litigation Manual* (Section of Litigation, American Bar Association, 3d ed. 1999).  
(Publications Planning and Marketing, American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611)
- C. Lubet, Steven. *Modern Trial Advocacy* (NITA, 2 ed. 1999).  
(National Institute for Trial Advocacy, Notre Dame Law School, Notre Dame, Indiana 46556; phone (800) 225-6482; web site: <http://www.nd.edu/~nita>)
- D. Mauet, Thomas A. *Pretrial* (Aspen Publishers, Inc. 5<sup>th</sup> ed. 2002).  
(Little, Brown: phone (800) 950-5259; web site:  
<http://search.barnesandnoble.com/textbooks/booksearch>)
- E. Mauet, Thomas A. *Trial Techniques* (Aspen Publishers, Inc., 6<sup>th</sup> ed. 2002).  
(Little, Brown: phone (800) 950-5259; web site:  
<http://search.barnesandnoble.com/textbooks/booksearch>)
- F. McElhaney, James W. *McElhaney's Trial Notebook* (Section of Litigation,

American Bar Association, 3<sup>rd</sup> ed. 1994).  
(Publications Planning and Marketing, American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611)

- G. Federal Rules of Evidence Summary Trial Guide (Elex Publishers, 5 Crescent Place South, St. Petersburg, Florida 33711; phone (800)546-ELEX; web site: <http://www.elexpublishers.com> )

### **III. OPERATIVE CONSIDERATIONS**

- A. Clear communication among counsel and paralegals.
- B. Identify and refer to orders or other papers governing the case.
  - 1. Case Management Orders.
  - 2. Stipulations between parties.
  - 3. Local Rules of Court.
- C. Identify and prioritize tasks, assets (materiel and personnel), time/suspense dates, locations and logistical considerations.
- D. Explicit division of labor.

### **IV. PRETRIAL STATEMENTS**

- A. Contents are generally dictated by Local Rules of Court, and preparation of Pretrial Statements is frequently preceded and largely formed by a “Pre” Final Pretrial Conference.
- B. “Pre” Final Pretrial Conferences – typical agenda:
  - 1. Discussion of the possibility of settlement (requires coordination with responsible DOJ or agency officers having authority to settle to be available [at least telephonically]).
  - 2. Stipulation to as many facts or issues as possible.
  - 3. Examination of all exhibits or substitutes of exhibits (photographs, usually), and other items of tangible evidence to be offered by any party at trial.
  - 4. Exchange of the names and addresses of all witnesses.
  - 5. Preparation of Pretrial Statements in accordance with FLRs.

C. Contents of a typical Pretrial Statement:

1. The basis of Federal jurisdiction.
2. A concise statement of the action.
3. A brief, general statement of each party's case.
4. An Exhibit List of matters to be offered into evidence at trial. The Exhibit list will include a descriptive notation sufficient to identify each exhibit, and a notation of objections as to specified exhibits, see Marking and Listing Exhibits, below.
5. A Witness List of persons who may be called at trial.
6. An Expert Witness List which includes a statement of the subject matter and summary of the substance of expected testimony pursuant to Fed.R.Civ.P. 26(e)(1) and (3).
7. In cases involving monetary damages, a statement of the elements of a claim and the amount being sought for each element thereof.
8. A list of all depositions to be offered in evidence at trial (as distinguished from possible use for impeachment), including designations of page/line numbers to be offered from each deposition.
9. A concise statement of those facts which are admitted and will require no proof at trial, together with any reservations directed to such admissions.
10. A concise statement of applicable principles of law on which there is agreement.
11. A concise statement of those facts which remain to be litigated (without incorporation by reference to prior pleadings or memoranda, i.e., you need to lay it out briefly in this statement).
12. A concise statement of those issues of law which remain for determination by the court (without incorporation by reference to prior pleadings or memoranda, i.e., you need to lay it out briefly in this statement).
13. A concise statement of any disagreements as to the application of the Federal Rules of Civil Procedure or the Federal Rules of Evidence.
14. A list of all motions or other matters which require action by the

court.

## **V. MARKING AND LISTING TRIAL EXHIBITS**

- A. “The Meet-and-Mark.” Purpose is to examine, review, label, record objections to / stipulations concerning all exhibits offered at trial.
- B. When and where it happens; procedures.
- C. Preparation of the Exhibit List after the Meet-and-Mark, contents, see Pretrial Statement, above.

## **VI. LOGISTICAL REQUIREMENTS, CONSIDERATIONS, PREPARATION**

- A. Long distance travel, witness transportation, lodging, and reimbursement.
- B. Final fact-witness preparation.
- C. Final expert-witness preparation.

## **VII. MISCELLANEOUS TRIAL MANAGEMENT CONSIDERATIONS**

- A. Management of sensitive exhibits.
  - 1. Defined – things like drugs, weapons, currency, classified documents, articles of high value, and other similar matters. When offering sensitive exhibits and exhibits other than documents into evidence, courts generally require that the party also offer a photograph of the exhibit.
  - 2. Typical requirements imposed by the courts -- At the conclusion of each daily proceeding, when the court recesses, be prepared to receive back from the clerk or courtroom deputy all sensitive exhibits for safe-keeping until the next session of court. The party offering the exhibit is responsible for its maintenance, custody, and integrity during the recess. Be prepared to coordinate such matters as secure facilities, cabinets, safes, or other containers with other Executive agencies close to the location of the courthouse. After the completion of the trial, the clerk or courtroom deputy will return sensitive exhibits to the proponent party (who will have substituted a photograph into the record. The proponent party is responsible for maintenance, custody, and integrity of the exhibit during the time permitted for appeal and the pendency of appeal (if one is taken).

**B. Oversized exhibits.**

1. Defined – any document or other exhibit larger than the dimensions of a piece of legal paper (8-1/2” x 14”).
2. Typical requirements imposed by the courts -- generally must be photographed and that photograph, however mounted, cannot exceed the dimensions of a standard piece of bond paper (8-1/2” x 11”). After the completion of the trial, the clerk or courtroom deputy will return oversized documents and exhibits to the proponent party (who will have substituted a photograph into the record. The proponent party is responsible for maintenance, custody, and integrity of the exhibit during the time permitted for appeal and the pendency of appeal (if one is taken).

**VIII. CONCLUSION**

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